The Bionetics Corporation *and* National Association of Government Employees, Local R7-1, affiliated with Service Employees International Union, AFL–CIO, Petitioner. Case 14–RC–11695

April 30, 1997

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections to and determinative challenges in an election held on October 10, 1996, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 35 votes cast for and 33 against the Petitioner, with 9 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs and has adopted the Regional Director's findings and recommendations and further finds that the challenges to the ballots of Sharon Bruce, Gary Cooper, Laura Ivy, William Ketchum, Louis Kranung III, Jerry McDonald, and Ronald Parker raise substantial and material questions of fact that best can be resolved by a hearing.

DIRECTION AND ORDER

IT IS DIRECTED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the challenges to the ballots of Sharon Bruce, Gary Cooper, Laura Ivy, William Ketchum, Louis Kranung III, Jerry McDonald, and Ronald Parker.

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. Within the time prescribed by Section 102.69 of the Board's Rules and Regulations, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately on the filing of such exceptions, the party filing them shall serve a copy on the other party and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS ORDERED that this matter is remanded to the Regional Director for Region 14 for the purpose of arranging such hearing, and the Regional Director is authorized to issue notice thereof.

MEMBER FOX, dissenting in part.

The Petitioner's Objection 1 alleged that a raffle conducted by the Employer on the day of the election was objectionable. Among the reasons given was that Jill Foss, the individual manning the raffle table, was a supervisor within the meaning of Section 2(11). On the basis of an affidavit submitted by the Employer, the Regional Director determined that Foss was an employee, rather than a supervisor; but that same affidavit indicated that Foss was solicited by one of the Employer's managers to conduct the election-day raffle.

The Petitioner cites Board precedent for the proposition that an employer's soliciting employees to engage in antiunion campaign activity, is a violation of Section 8(a)(1) of the Act.[1] Because the solicitations in the cases cited by the Petitioner are arguably more explicit solicitations to campaign against a union than the incident here involving Foss' duties in connection with the raffle, and because, given the change in theory regarding this objection, the Employer has not had an opportunity to show surrounding circumstances that might counsel against extending that line of authority to this incident, I would send this objection to a hearing rather than find objectionable conduct outright.

The fact that evidence that Foss, as an employee, was solicited was not part of the Petitioner's original submission but rather was turned up in the Regional Director's investigation of the Petitioner's objection is no reason to foreclose the Petitioner's present reliance on that evidence. "[O]nce an investigation is begun pursuant to timely filed objections, and evidence is uncovered during the course of the investigation that war-

[1] In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation that the Employer's Objections 4, 6, and 7 be overruled.

We also adopt the Regional Director's recommendation that the Petitioner's Objection 1 be overruled. The Petitioner objected to the election on the ground, inter alia, that Foss, a distributor of raffle tickets as part of an antiunion campaign, was a supervisor. The Regional Director overruled the objection because he found that Foss was not a supervisor. The Petitioner now argues, for the first time, a wholly different and inconsistent theory, i.e., that the Employer engaged in objectionable conduct by asking Foss, *an employee*, to distribute the raffle tickets. Our dissenting colleague would remand this case for evidence concerning this theory. We would not do so. Although the Regional Director may have been free to consider that alternative theory, the Petitioner did not urge him to do so, and he did not do so sua sponte. In these circumstances, we would not now permit the Petitioner to belatedly raise that contention. We further adopt, pro forma, the Regional Director's recommendation that the Petitioner's Objections 2 and 3 be overruled. Finally, we adopt pro forma the Regional Director's recommendation that the challenge to the ballot of Jill Foss be overruled.

[1] In *Studio S.J.T.*, 277 NLRB 1189, 1200 (1985), the Board adopted a judge's decision holding: "By simply recruiting an employee to engage in anti-union conduct, Respondent violated Section 8(a)(1)." Accord: *Wex-Tex of Headland*, 236 NLRB 1001, 1005 (1978); *Delco-Remy Division*, 234 NLRB 995, 996 (1978), enf. denied 596 F.2d 1295, 1311 (5th Cir. 1979); *Marathon LeTourneau Co.*, 208 NLRB 213, 216 (1974), and cases there cited. (In *Marathon LeTourneau*, the solicitation was also found to be objectionable conduct. Id. at 223.)

rants a finding of election interference . . . that evidence will support setting aside the election.'' *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138 (1988). Here, as explained above, I would find that evidence warranting a hearing has been uncovered, and I would not foreclose that hearing because the evidence turned up in the investigation rather than in the original submission.